No. 85-224

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF RIVERSIDE, *et al.*,
Petitioners,

v.

SANTOS RIVERA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICI CURIAE CONGRESSMEN THOMAS J. BLILEY, JR., PHILIP M. CRANE, WILLIAM E. DANNEMEYER, NEWT GINGRICH AND THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

(FILED WITH WRITTEN CONSENT)

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QUESTIONS PRESENTED

1. Whether, on the facts of this case, the recovery of $33,350 in total damages against only six out of 32 defendants originally sued constitutes a sufficient degree of success to justify an attorney's fee award of over $245,000 under the "reasonableness" standard of the Civil Rights Attorney's Fees Awards Act.

2. Whether it is "reasonable" within the meaning of the Awards Act to compensate the prevailing party's attorneys for all time spent on extraneous claims against multiple defendants which, even though related in theory to the claim on which plaintiffs prevailed, were summarily dismissed under F.R. Civ. P. 56.

3. Whether, in a case where non-monetary relief was not granted, court-awarded attorneys fees which are substantially larger than the total damages awarded to the plaintiff can ever be considered "reasonable" within the meaning of the Awards Act.

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INTERESTS OF AMICI CURIAE

Rep. Thomas J. Bliley Jr. is a United States Congressman representing the Third District of Virginia. Rep. Philip M. Crane is a United States Congressman representing the Twelfth District of Illinois. Rep. William E. Dannemeyer is a United States Congressman repre-

senting the Thirty-ninth District of California. Rep. Newt Gingrich is a United States Congressman representing the Sixth District of Georgia.

Each of the congressional amici is deeply concerned regarding abuses of the Civil Rights Attorney's Fees Awards Act of 1976 ("the Act"), 42 U.S.C. § 1988, a federal statute enacted by Congress. While the amici all support effective enforcement of the civil rights laws, they are firmly committed to the view stated in the Act's legislative history that it should never be used to sanction economic "windfalls" for attorneys. H.R. Rep. No. 94-1558, p. 9 (1976); S. Rep. No. 94-1011, p. 6 (1976). Yet grossly disproportionate fee awards such as that in the instant case are now approved by federal courts with disturbing frequency. The harm resulting from such exorbitant awards is compounded by the fact that the largest awards—sometimes exceeding *millions* of dollars—are commonly assessed against state and local government defendants. This is of particular concern to the congressional amici, since millions of dollars in state revenues are thereby being diverted to prosperous lawyers at the expense of local government programs which would otherwise benefit their constituents. This brief, therefore, reflects the strong sense of the congressional amici that the Awards Act is being used to sanction economic windfalls for lawyers that Congress never intended to allow.

Amicus the Washington Legal Foundation ("WLF" or "Foundation") is a non-profit public interest law center that engages in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members located throughout the United States (including in the State of California) whose interests the Foundation represents.

This brief is filed by WLF with the written consent of all parties.

WLF focuses its litigation efforts on cases of nationwide significance affecting the liberties and values of its members. For example, WLF has filed amicus briefs with this Court in such cases as *Memphis Firefighters v. Stotts*, 104 S. Ct. 2576 (1984); *General Building Contractors Association, Inc. v. Pennsylvania*, 102 S. Ct. 3141 (1982); and *United Steelworkers v. Weber*, 444 U.S. 193 (1979).

WLF's interest in this case stems from its strong concern that the Awards Act is being used to subsidize a profitable "cottage industry" for activist lawyers at the bitter expense of state and local taxpayers. In case after case, prosperous big city law firms, self-styled civil liberties groups, and "legal services" groups are collecting excessive court-ordered fees drawn from state and local revenues to subsidize their litigious onslaught against state and local governments.

The disturbing question posed by this case is, why should the ordinary taxpayer be forced to underwrite legal fees which no sensible private sector client would *even consider* paying in consideration for the limited or questionable results achieved? WLF submits that it is manifestly *un*reasonable to award these lawyers fees which they could not conceivably command for the results achieved in a genuinely competitive market place.

WLF believes that the rights of the American taxpayers who unknowingly subsidize these abuses demand that rigorous standards be imposed to bring these exorbitant fees down to earth. This case presents this Court with a rare opportunity to do just that.

STATEMENT OF THE CASE

In the interests of brevity, the amici curiae adopt the statement of the case set forth in the brief of the petitioners.

SUMMARY OF ARGUMENT

1. The award of grossly disproportionate attorney's fees in this case reflects a nationwide problem of scandalous proportions. Too many federal courts routinely approve inflated claims for fees under 42 U.S.C. § 1988 without applying any genuine standards of reasonableness. Since many of these excessive fee awards are levied against state and local government defendants, they are causing a counterproductive and unwarranted diversion of public revenues to the unjustified enrichment of prosperous counsel. The Supreme Court should enunciate stricter standards of reasonableness under § 1988, starting with a legal presumption that attorney's fees that exceed the damages are inherently unreasonable in the absence of significant non-monetary relief.

2. Both lower courts flagrantly disregarded the holdings of *Hensley v. Eckerhart* as well as this Court's remand order in this case. The district court's extreme recalcitrance is clearly evidenced in its defiant statement at the remand hearing that it would not change the award at all. Both courts' opinions on remand reveal that they deliberately avoided compliance with the principles of *Hensley* and then proceeded to openly defy those principles.

3. The district court's stated rationale for reaffirming the $245,343.75 award displays reversible errors of law and fact. The Court refused to acknowledge that the relief achieved was limited in relation to the scope of the litigation as a whole. Its stated justification for the gaping disparity between relief and award was legally and factually misconceived. And a critical factual premise for the court's evaluation—i.e., that jury's do not often award large damage awards in police misconduct cases—was clearly and demonstrably erroneous.

ARGUMENT

I. THE PALPABLY DISPROPORTIONATE FEES AWARDED IN THIS CASE REFLECT THE LOWER COURTS' FAILURE TO APPLY MEANINGFUL STANDARDS OF REASONABLENESS.

The attorney's fees awarded in this case are so palpably disproportionate to the relief obtained—i.e., paying someone over $7 to help gain you $1—that any sensible non-lawyer would immediately recognize that something was amiss in the system that sanctions them. No reasonable client would agree to pay attorneys $245,000 for their services in pursuing litigation that yielded only $33,350 in total recovery. Such a disproportionate fee is *intrinsically* unreasonable, within the plain meaning of 42 U.S.C. § 1988. It is not even a close case. Nonetheless, the courts below held that the taxpayers of the City of Riverside, California must pay such extraordinary fees for the "service" of having litigation waged against 31 of their city's police officers. Most of those officers were absolved of all liability.

Such incidents have grown commonplace throughout the country, to the point where astronomical fees paid to plaintiffs' lawyers due to proliferating "civil rights" suits have become a serious drain on state and local government revenues.

There is no sound reason for this state of affairs to exist or continue, since fees awarded under section 1988 are already subject to a statutory standard of "reasonableness". It only remains for the courts to give objective force and content to that standard. This case affords a suitable opportunity for this Court to take the lead in that task.

Excessive and exorbitant fees are awarded in these cases because too many courts blithely assume that whatever amount of time attorneys devote to a civil rights case is automatically "reasonable" and fully com-

pensable. Yet evidence from case after case documents that attorneys too often submit grossly excessive claims for fees in cases covered by § 1988. *See, e.g., Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1275 (N.D. Ohio 1985) (attorneys awarded $348,000 on their claim of $723,194 in abortion case); *Jacquette v. Black Hawk County Iowa*, 710 F.2d 455 (8th Cir. 1983) (award of $20,437 on attorney's claim for $96,422). It is time for the courts to stop condoning and even encouraging this exploitative trend. More rigorous and exacting judicial standards are necessary to restore genuine meaning to the "reasonableness" limitation on fees awarded under the Act.

This Court should clarify and reemphasize the fee-restraining standards it described in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and set forth still tougher standards and restrictions to contain the unconscionable excesses which characterize so many fee awards today under § 1988. In particular, the Court should establish a strong legal presumption that, at least in cases where there has been no significant injunctive relief, attorney's fees exceeding the amount of damage recovery are unreasonable. It should also establish a firm rule that reasonably specific contemporaneous records of chargeable hours are a mandatory component of reasonable claims for fees under § 1988.

A. The Shockingly Disproportionate Fees In This Case Reflect A Nationwide Problem Of Scandalous Proportions.

The exorbitant attorney's fees levied against the taxpayers of the City of Riverside in this case typify a phenomenon which has become all too commonplace in recent years.

A relatively limited individual grievance filed by a prisoner, a student, or a mental patient against the state is soon escalated by aggressive civil rights counsel into

an uncompromising, "across-the-board" attack on the practices of the government institution in question. Or an isolated incident of police malfeasance is pursued in court with a vindictive intensity that places the incident out of all proportion to the overall, day-to-day performance of the hard-working police force in question. It is instructive to keep in mind here that the more broadly these cases can be framed, the greater the scope for generous fee awards to plaintiffs' counsel. See *Copeland v. Marshall*, 642 F.2d 880, 911-12 (D.C. Cir. 1980) (Wilkey, J., dissenting).

In these categories of cases, counsel for civil rights plaintiffs pursue the litigation with an unfettered zeal which assumes the proportions of a single-minded crusade. Imbued with the unalloyed "virtue" of their cause —not to mention the substantial likelihood of healthy court-ordered legal profits—these attorneys devote endless hours pursuing even the smallest details of their cases. *See e.g., Grendel's Den, Inc. v. Larsen*, 749 F.2d 945, 952-54 (1st Cir. 1985); *Copeland v. Marshall*, *supra*. Time is simply no object—except when it becomes time to convert accumulated hours into lucrative fees under § 1988. Then it becomes significant indeed, and every hour conceivably allocable to the case in question is recalled or "reconstructed" with remarkable thoroughness. If counsel manage to "prevail" in the case at all—and a routine settlement or winning on only one out of eight claims is for some curious reason treated as "prevailing" in this odd context—they can be confident that a receptive federal judge will ratify the "reasonableness" of their entire efforts, *and more. See Ross v. Saltmarsh*, 521 F. Supp. 753 (S.D.N.Y. 1981) ($277,104 fee, including 25% "bonus", for settlement of case challenging procedures for suspending public school students).

Under these permissive standards, there is no disincentive at all to restrain the lawyer's foible of "massive legal overkill," see *Henry v. First National Bank of Clarksdale*, 603 F. Supp. 658, 663-65 (N.D. Miss. 1984).

On the contrary, there is every powerful incentive to roll-up and "churn" billable hours to the fullest extent possible, with the collection of a "lodestar" fee award virtually guaranteed by the lower courts' uncritical generosity in dispensing lawyer's profits. As evidenced by this case, prevailing on even a small portion of the claims asserted enables counsel to collect in full for pressing dubious "related" claims even though they may have been ignominiously defeated. And as further illustrated by this case, some district courts have been remarkably indulgent in overlooking shoddy, self-serving methods of recording "billable" time. *See, e.g., Grendell's Den, Inc. v. Larsen, supra*, 749 F.2d at 951-52; *Jacquette v. Black Hawk County Iowa, supra*, 710 F.2d at 464.

But in enacting the Awards Act, Congress stressed that economic "windfalls" for attorneys were not to be condoned. S. Rep. No. 94-1011, 94th Cong., 2d Sess. p. 6 (1976). In keeping with that warning, this Court only recently admonished against awarding attorney's fees which are disproportionately large in comparison to the actual results obtained; fees based on 100% of "raw" hours which fail to reflect even minimal "billing judgment"; fees which are the product of wasteful overstaffing or duplicative effort; and fees which are not adequately supported by reliable, contemporaneous billing records. *Hensley v. Eckerhart, supra*, 461 U.S. at 433-40. The presence of these or other billing abuses provide sufficient basis for a reviewing court to reject and reduce an exorbitant fee claim. That is precisely the case here.

Regretfuly, some lower courts have been less than diligent in enforcing *any* kind of standards to govern exorbitant attorney's claims under § 1988. The enormous frustration of those who have sought to curtail this unwarranted exaction on state and local taxpayers was captured perfectly by Judge Malcomb Wilkey, dissent-

ing, in *Copeland v. Marshall*, 641 F.2d 880, 908 (D.C. Cir. 1980), where he prophetically observed:

> In our colleagues' "lodestar" opinion, the path of attorney's fees in Title VII litigation is easy to discern. It is Up, Up, and Away! It is Per Calculos Ad Astra. [Citation omitted].

Judge Wilkey was moved to his dissent in *Copeland* by a fee award of $160,000 to the prosperous Washington, D.C. law firm of Wilmer, Cutler, and Pickering (the firm had actually claimed even more, $206,000) as a reward for recovering $31,345 in backpay in an employment discrimination action against the federal government. His dissent thoroughly and prophetically described the outrageous fees which will continue to be rolled-up against government defendants as long as plaintiffs' counsel are

> . . . assured from the outset that all hours spent on the case will be reimbursed at the firm's customary rate so long as its efforts are relevant to issues on which it ultimately prevails. [641 F.2d at 911]

This case confirms the wisdom of Judge Wilkey's dire prophecies in *Copeland v. Marshall*. Since plaintiffs' counsel were confident they would establish at least *some* liability for the ill-conceived police action in issue, they had every incentive to plead and pursue the case in the broadest possible terms. Even if most of their wide-ranging claims were dismissed (as they actually were), the certain recovery on the "core" claim would enable them to claim fees for *all* their work on the flexible judicial theory of "inter-related" claims.

Current practice under § 1988 is thus clearly encouraging over-inclusive claims, gross over-utilization of attorney time, and consequently a disproportionate (and regressive) shifting of public resources to litigious counsel. Judge Wilkey's thoughtful analysis of developing practice under the Awards Act in *Copeland v. Marshall*

led him to describe the resultant system as one that is devoted to "the care and feeding of lawyers rather than injured plaintiffs." 641 F.2d at 909. As proven once again by this case, he was right.

The nature and implications of the lower court's errors in this case are best understood by recognizing the broader problem of excessive fee awards under the Act. The excessive fees awarded here are merely an egregious example of the shocking "windfall legal profits" which are now dispensed with seemingly casual largesse by various federal courts nationwide. The essential error of both courts below in this case—i.e., their failure to apply any objective standards of reasonableness and proportionality to the fees awarded—surfaces in case after case where grossly excessive fees have been awarded. If the ruling below is allowed to stand by this Court, windfall awards like those described below will continue to be commonplace.

In *Grendel's Den, Inc. v. Larsen, supra,* the district court awarded over $300,000 to two Harvard law professors for helping their client to obtain a liquor license on constitutional grounds. On appeal, the First Circuit determined that those fees were triple the amount that was reasonable. The Court of Appeals found that the professors had charged an excessive hourly rate; had expended hours of preparation far beyond what was reasonably necessary; had claimed fees for duplicative and excessive time spent (e.g., "doubling up" for hearings when only one lawyer participated); and had claimed fees not supported by *any* contemporaneous time records. 749 F.2d at 951-55. Therefore, the $323,508 fee award was reduced to $113,640. But under the shapeless and invertebrate "standards" applied by the Ninth Circuit in *this* case, this $323,000 "windfall" would undoubtedly have been approved to the last dollar.

Similarly shocking overcharges characterized the case of *Henry v. First National Bank of Clarksdale,* 603 F.

Supp. 658 (N.D. Miss. 1984). There, a prominent Washington, D.C. law firm (Hogan & Hartson) utilized the services of no less than *nine* of its attorneys in obtaining an injunction against enforcement of a state court judgment which had enjoined an NAACP boycott of local merchants. The plaintiffs attempted to claim $227,000 as "reasonable" attorney's fees, but the district court awarded "only" $112,096. Because they are so highly relevant to the basic issue at hand, some of the district court's observations on the various billing abuses presented in the *Henry* case warrant quotation at some length. (*Id.* at 664-66):

> [W]e conclude that there was substantial duplication of effort by the several attorneys involved which should not be rewarded by this court. . . . (E)xamination of the time sheets generated in this cause leaves the court with the stark impression that *counsel were engaged in massive legal overkill.*
>
> * * * *
>
> The court finds that the presence of more than one Hogan & Hartson attorney at the TRO and preliminary injunction hearings in Oxford, Mississippi, . . . was not reasonably warranted under the circumstances.
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> * * * *
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> As was true of counsel's conduct of the litigation and the trial court, Hogan & Hartson's involvement in the appellate proceedings is marked by *extravagant usage of time and an utter failure to exercise billing judgment.* In determining what time is properly excludable, we follow the compelling guideline expressed in the legislative history of Sec. 1988: *the statute "may not be subverted into a ruse for producing 'windfalls' for attorneys." Dowdell v. City of Apopka,* 698 F.2d 1181, 1192 (11th Cir. 1983) (citing S. Rep. No. 1011 at 1, 94th Cong., 2d Sess. (1976), reprinted in (1976) U.S. Code Cong. & Ad. News 5908, 5912-13) [emphasis added].

Again, both courts below in this case applied a "rubber stamp" approach which would never have questioned the abusive practices rebuked in the *Henry* case. The Ninth Circuit and the district court would have tersely approved the entire $227,000 claim for fees simply because the case was "difficult" and the results "outstanding."

Further typifying the abuses at issue here is *Jacquette v. Black Hawk County, Iowa*, 710 F.2d 455 (8th Cir. 1983). There, the "relief" obtained was a paltry $1,500 settlement in an action challenging a single termination of employment on due process grounds. For this, plaintiff's attorneys filed a request for over *$96,000*[1] in attorney's fees and were awarded $20,437 in fees and $2,315 in costs. On appeal, the Eighth Circuit delivered a scathing indictment of the enormous disparity between relief and attorney's fees, stressing that the Awards Act "should not serve as a vehicle to charge exorbitant fees." 710 F.2d at 463. Nonetheless, the court inexplicably declined to disturb this still overly-generous award, but remanded the claim with instructions for the lower court to inquire into the appropriateness of disciplinary sanctions for the inflated fee request. Dissenting from the court's approval of even the $20,000 award, Judge Bright observed:

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[1] To appreciate the full flavor of the abuses at work here, the Court should consider not only the shocking magnitude of the court-approved *awards*, but the even greater size of the *fee requests* submitted by counsel. A survey of the cases shows a disturbing gap between what attorneys claim and what is ultimately held reasonable by even the most permissive courts. E.g., *Akron Center for Reproductive Health v. City of Akron*, 604 F.Supp. 1275 (N.D. Ohio 1985) (attorneys were awarded $368,709, but had claimed *$723,194*); *Lampheare v. Brown University*, 610 F.2d 46 (1st Cir. 1979) (attorneys awarded $252,600, but had claimed over *$500,000*). Viewed most charitably, what emerges from reviewing these cases is that many attorney-claimants have a distinctly inflated notion of the reasonable value of their own services.

> [T]he real losers in this case are the taxpayers who have had to pay the ultimate cost of this litigation. This case emphasizes to judges and attorneys alike the need to find ways to stem the inordinately high cost of litigation in cases like Jaquette's. [710 F.2d at 464]

There are countless additional cases where the extreme disproportion between the limited relief obtained and the enormous attorney fees awarded demonstrates the compelling need for effective standards which will curtail this insupportable profligacy with public funds. *E.g., Texas State Teachers Association v. San Antonio Indep. School District*, 584 F. Supp. 61 (W.D. Tex., 1983) (compensatory and punitive damages totaling $25,135, compared to counsel's fee award of $158,801); *Copeland v. Marshall, supra* ($31,345 in backpay, compared to $160,000 fee award); *Cunningham v. City of McKeesport*, 753 F.2d 262 (3d Cir. 1985) (petition for certiorari pending) ($17,000 in damages to house purchased for $2,700, compared to $35,887 fee award).

In many of these cases, the attorney's fees assessed against a state or local government are so enormous that they become a major draw-down upon the state or county government budget. The huge outlays ordered by courts to be paid to attorneys thus become a substantial diversion of funds from fundamental government programs—often the very programs which the attorneys claim to be serving in their lucrative taxpayer-subsidized litigation efforts. *This factor should be incorporated into the "reasonableness" assessment in cases against government defendants.* For example, it is *not* reasonable to divert millions of dollars from state funds available for prison reform in order to pay outside "civil rights" lawyers to sue for prison reform.

Few cases illustrate this phenomenon better than *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1984), the controversial Colorado prison litigation. There, the dis-

trict court awarded over *$700,000* in legal fees to a coalition of ACLU and "National Prison Project" attorneys for their efforts in litigation over conditions at the prison in Canon City, Colorado. The court attempted to justify its enormous economic largesse by focusing upon the large amounts of time devoted by the lawyers in pursuing the prison reforms in court. But what the district court and the court of appeals inexplicably ignored as they strained for a rationale to justify these exorbitant fees was that they were "earned" in litigation which was largely a wasteful exercise. 713 F.2d at 560-61 (Barrett, J., dissenting).

In 1976 and 1977, the Colorado legislature had already appropriated over *$22 million* for the renovation of existing prison facilities and the construction of new ones. The five-week trial staged by counsel was therefore an exercise in legal redundancy; Colorado had *already* recognized the deficiencies in its prison system and was devoting an enormous portion of its state budget to prison improvement and construction. It is highly instructive that the legal fees awarded for the *Ramos v. Lamm* suit exceeded the total cost budgeted for an entire new correctional facility.

Even though the Tenth Circuit remanded the $739,000 "bonanza" award to the district court with instructions to reconsider it in light of guidelines set forth by the court of appeals, at least one member of the panel was convinced that the award was a travesty. As Chief Judge Barrett wrote in dissent, 713 F.2d at 560-61:

> The public interest was not served—in fact it was ill-served—and the Colorado taxpayers were abused by the trial court's award of $709,933.50 and expenses in the amount of $32,782.43. The five week trial involved a parade of national prison system facility experts and a full array of at least *twelve lawyers* representing Ramos who have claimed that their efforts required the expenditure of in excess of

> *9,000 hours* in the public interest. In my view, *this was unnecessary, uncalled for, and contrary to the public interest, working to the detriment of the taxpayers of Colorado.* [Emphasis added].

See also Oliver v. Kalamazoo Bd. of Education, 576 F.2d 714 (6th Cir. 1978), where the district court had acknowledged that "This [$357,029] fee award will draw upon public funds at a time when financial resources are especially dear."

While prison reform litigation has been an especially bountiful field to cultivate for counsel who exploit the Act's award provisions, other areas of civil rights practice have been comparably lucrative. In *White v. City of Richmond*, 713 F.2d 458 (9th Cir. 1983), for instance, counsel recovered *$694,185* in fees in a wide-ranging "police brutality" case which was settled without a trial. Indeed, attorneys have been richly rewarded in case after case where intimidated state or county defendants have agreed to settle or sign a consent decree without putting plaintiff's counsel to the actual test of a trial. In *Liddell v. Bd. of Education*, No. 72-100C(3) (D. Mo., Dec. 28, 1984), two prominent and prosperous law firms were generously awarded *$2,400,000* of the taxpayers' money for their legal efforts in pressuring a City Board of Education to agree to a busing settlement. Given the routine readiness with which courts throughout the United States have handed down busing orders in the past 20 years, it is difficult to comprehend why the procurement of such a routine result should warrant such a grotesquely disproportionate fee award.

The painful lesson of these cases is that claims for "lodestar" fees based on total hours "worked"—"work" in this context often including, *e.g.*, relaxation in the seat of an airplane, billed in full as "travel time", or so-called "stand-by" time—simply cannot be ratified at face value, as was done in this case. A far more exacting degree of

scrutiny is demanded if the "windfalls" so pointedly denounced in the Act's legislative history are to be avoided in the future. Courts must be required to separate the over-inclusive "raw" hours submitted by counsel from the "hard" or productive hours which alone can be used as the starting point for determining a reasonable fee. *Ramos v. Lamm, supra,* 713 F.2d at 553. To the extent that counsel's imprecise recordkeeping makes such separation unmanageable, then *counsel* must be required to pay for the deficiency in terms of a reduced fee. These considerations were impermissibly ignored by both lower courts in this case.

Most pertinently for this case, a plaintiff's mere success in establishing *some* liability in a given case should not be enough to permit complete reimbursement for all time spent on all aspects of the case. Limited success must be matched with limited compensation. Anything different is simply not reasonable, and will continue to foster wasteful proliferation of claims and unproductive legal maneuvering in these civil rights cases.

II. THE RULING BELOW MOCKS THIS COURT'S HOLDING IN *HENSLEY* AND THE REMAND ORDER IN THIS CASE.

In *Hensley v. Eckerhart, supra,* this Court made it unmistakably clear that fee awards under § 1988 must take into account, and must reflect, the relative degree of success achieved in the litigation. This means that the magnitude of the attorney's fees must be at least roughly proportional to the measureable relief or recovery achieved in the litigation. The "proportionality" factor is especially important in cases (like this one) where numerous claims are joined together in one complaint, but only a limited number of them ultimately prevail.

Writing for the Court in *Hensley,* Justice Powell repeatedly emphasized this basic consideration in terms

which can leave no room for argument as to its significance:

> If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. [461 U.S. at 436]
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> * * * *
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> Again, the most critical factor is the degree of success obtained. [*Id.*]
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> * * * *
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> A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole. [*Id.* at 440]

Further, while the Court acknowledged that the trial court retains appropriate discretion in fixing fee awards, it still pointedly admonished that "This discretion, however, must be exercised in light of the considerations we have identified." *Id.* at 437.

These binding principles from the *Hensley* ruling could hardly be more pertinent to this case had they been expressly designed for it. Given the comprehensive and ambitious scope of the 32-defendant, multiple-cause-of-action complaint in this case, there is no denying the fact that the $33,000 liability established against only six defendants was "limited in comparison to the scope of the litigation as a whole." *Id.* The grotesque assymetry between the modest recovery for the clients and the princely $245,000 attorney fees for their two counsel presents *exactly* the kind of legal miscarriage which cries out for reformation under the *Hensley* principles.

But despite this Court's remand with instructions to apply the foregoing principles from the *Hensley* opinion, the district court made it clear from the first that it was not going to reconsider so much as a penny of its award. As the district court stated at the hearing held

to show formal "compliance" with this Court's order (R.T., vol. B. App. 15 at 15-4, -5, and -14):

> [The Supreme Court] merely wants the court to give it some more findings. . . . *I tell you now that I will not change the award. I will simply go back and be more specific about it.* [Emphasis added].

Rarely has a lower court's flagrant disregard for this Court's authority been so openly flaunted. To allow such judicial lawlessness to go uncorrected is to risk compromising the binding authority of this Court's orders and rulings which is essential to the operation of our constitutional system of government.

Obviously, the district court had no intention of re-evaluating its award in light of the principles stressed in *Hensley*. Those principles were incompatible with the district court's avowed purpose of compensating plaintiffs' counsel for any and all hours they might claim, regardless of what those hours represented. Rather, the district court's sole object on remand was to "retailor" its findings and conclusions to create the *illusion* of compliance with the remand order.

But the United States Supreme Court does not vacate decisions and remand them to already overburdened federal courts for the purpose of obtaining mere "lip service" or a form of cynical, *pro forma* reconsideration. Yet that is precisely what resulted here. The district court made good on its word that it would "not change the award" and that it would confine itself to a cosmetic rearrangement of its findings.

This Court should reject the self-serving findings of fact and conclusions of law which are mechanically recited in the district court's remand opinion. That document reflects only a profound misunderstanding of the facts and the law, coupled with an attempt to obscure the *Hensley* issues in a smog of empty generalities and conclusory pronouncements.

A. The District Court Refused To Adjust The Award To Reflect Only "Partial Or Limited Success," In Clear Violation Of *Hensley's* Requirements.

Plaintiffs ultimately prevailed against six out of 32 defendants and on only three out of 22 original claims. Damages recovered against all defendants totalled only $33,000, as against the six-figure awards so frequently awarded in "police brutality" suits (see cases cited p. 22, *infra*).

There can be no question, therefore, that the relief here was "limited in comparison to the scope of the litigation as a whole." *Hensley*, 461 U.S. at 437. That in itself is sufficient to require a reduced fee award. *Id.* Nor can there be any question that the plaintiffs achieved only "partial or limited success," *id.* Under these circumstances, *Hensley* clearly establishes that full compensation for all hours expended on the litigation is *not* warranted, and a reduced fee is appropriate. As further emphasized in *Hensley*, *id.* at 436:

> But had respondents prevailed on only one of their six general claims . . . a fee award based on the claimed hours clearly would have been excessive.

Given the similarly fractional success in this case, a fee award based on a full $125/hr for 100% of the hours claimed was "clearly excessive" under *Hensley*.

Further, the *Hensley* ruling would mandate a reduction of the instant award even if (contrary to the fact) all the hours claimed had been "reasonably expended." *Id.* at 436. That is because full compensation for all hours worked is not always co-extensive with "reasonable attorney's fees" within the meaning of § 1988. As *Hensley* made clear, a limited or narrow success within the context of an ambitiously overbroad lawsuit does not justify compensation for all of the extensive attorney work-hours which are attributable in large part to the unsuccessful (or "non-prevailing") portions of the

case. Otherwise, the degree-of-success factor stressed so heavily in *Hensley* would have little or no meaning. Merely prevailing on a small fraction of the claims asserted would effectively guarantee full fee recovery for *all* hours claimed. Such a permissive approach encourages attorneys in civil rights cases to assert and pursue even the most farfetched and dubious claims, so long as their "core" claim is likely to prevail. Such a wasteful approach to litigation was never intended by Congress and should not be condoned by this Court.

The district court's disregard for this Court's *Hensley* ruling was equaled by that of the court of appeals. That court's opinion likewise curtly rejected the notion that attorney's fees under § 1988 must be reasonably proportional to the relief obtained. So hardened was the Ninth Circuit's position on this point that its opinion resorts to outright misstatement. The panel insisted, for instance, that (App. 1-8):

> *The legislative history . . . lends no support* to the proposition that there need be a relationship between the amount of damages awarded to the prevailing party and the amount of attorney's fees awarded. [Emphasis added].

On the contrary, the legislative history lends strong and distinct support to the significance of the damages obtained as a factor limiting fee awards. The significance of the "results obtained" are stressed throughout the legislative history, and the House Report specifically emphasized "the amount received in damages, if any" as one of the five primary factors that must be considered in setting the fee award. H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 8 (1976). The foregoing unambiguous quote is only seven pages removed from the more generalized statement in the House Report cited and relied upon by the Ninth Circuit for the false proposition that the legislative history "lends no support" to the proportionality requirement. (App. at 1-8). The panel's

failure to identify or cite this critical passage on congressional intent does not reflect well upon the scholarly integrity of its opinion.

III. THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS ON REMAND ARE INSUPPORTABLE ON THEIR FACE.

The court's rationalization of why extremely high fees were justified despite relatively modest damages only demonstrates the profound misconceptions and misunderstandings which produced this insupportable award. Thus, in its attempt to denigrate the disproportionality problem on remand, the district court offered the following curious analysis: (Finding of Fact No. 5, App. at 2-5):

> The jury awarded total damages of $33,350. In the opinion of the Court, the size of the jury award resulted from (a) the general reluctance of jurors to make large awards against police officers, and (b) the dignified restraint which the plaintiffs exercised in describing their injuries to the jury. For example, although some of the actions of the police would clearly have been insulting and humiliating to even the most insensitive person and were, in the opinion of the Court, intentionally so, plaintiffs did not attempt to play up this aspect of the case.

Both of these considerations are legally irrelevant and logically invalid in terms of justifying the disproportionate fee award. Moreover, premise (a) regarding general jury practice in police brutality cases is demonstrably false.

First, the court was obviously "double-counting" in its efforts to contrive a justification. If (contrary to the facts, see *infra*) jurors were actually reluctant to award large damage awards in policy brutality cases, that factor is already fully accounted for under the "*Johnson*" factors of "difficulty" and "undesirability" of the litiga-

tion. But the question of specific results achieved (which was the question presented by the remand) is an entirely separate and independent consideration. The "difficulty" and "undesirability" factors cannot be *re*-cycled to bolster the paltriness of the results or damages obtained. Only recently, this Court sharply admonished an attorney fee claimant under § 1988 for that very kind of "double counting" in attempting to justify excessive fees. *Blum v. Stenson*, 79 L.Ed. 2d 891, 902 (1984). Thus, the district court erred in justifying the disproportionate size of the fees by redundantly invoking the difficulty and delicacy of the case.

Further, the district court clearly erred in finding or assuming that there is a "general reluctance of jurors to make large awards against police officers." The court cited no authority to support this blithe generalization, and small wonder. Precisely to the contrary, the federal reporters are literally swollen with cases where *enormous* damage awards have been assessed in civil rights cases against police officers. *E.g., Roman v. City of Richmond*, 570 F.Supp. 1544 (N.D. Cal. 1983) (*$3,000,000*); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) ($1,590,670); *Estate of Davis v. Hazen*, 582 F.Supp 938 (C.D.Ill. 1983) ($575,000 against police information clerk); *Herrera v. Valentine*, 563 F.2d 1220 (8th Cir. 1981) ($300,000); *Smith v. Heath*, 517 F.Supp. 774 (D. Tenn. 1980) *aff'd*, 691 F.2d 220 (6th Cir. 1981) ($132,000).

The most casual perusal of police brutality cases filed under the civil rights statutes reveals that six and seven figure awards are not at all uncommon and that awards in the range of $100,000 are virtually routine. *See also Spears v. Conlish*, 440 F.Supp. 490 (N.D. Ill. 1977) ($100,000 assessed against a single police officer); *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) ($100,000); *Stokes v. Del-*

cambre, 710 F.2d 1120 (5th Cir. 1983) ($310,000 in punitive damages against local sheriff and deputy).

It was clearly erroneous, therefore, for the district court to find that "the size of the jury award resulted from . . . the general reluctance of jurors to make large awards against police officers," (App. 205). There is no such "general reluctance." Juries make very large awards against police officers on a routine basis. Since this clearly erroneous factual assumption was the primary basis for the court's refusal to reduce the award under the proportionality standard of *Hensley*, it is sufficient in itself to require reversal.

Moreover, any juror reluctance to award large damages against police officers as individuals would certainly not restrain them from approving large damages to be assessed against the City of Riverside. Again, the cases are legion where very large damages have been levied against cities, counties, and municipalities because of their employees' torts. (See cases cited *supra*). The district court erred again in failing to address this obvious consideration in its attempt to rationalize the modest damages award.

The court's curious emphasis on the "dignified restraint" supposedly exercised in presenting plaintiffs' case reflects similar confusion as to the issue at hand. The court's charge on remand was to reconsider its award in light of *Hensley's* pointed admonitions that "partial or limited success" and "limited relief" make reduced fees appropriate. In what can only be described as a judicial *non sequitur*, the district court responded by finding that the modest $33,000 damage award is explainable by plaintiffs' "restraint" in describing their injuries. However admirable such "restraint" might have been, it has *absolutely nothing* to do with the question of whether the $33,000 relief warranted a $250,000 attorney's fee. The only possible relevance of this point is

its tendency to *diminish* counsel's claim to such a heroic fee. From a "result-oriented" standpoint, the "restrained" presentation may well have been a tactical error of counsel. In any event, this patently illogical rationalization of the disparity between damages and fee once again demonstrates the district court's clear failure to grasp the issues posed by *Hensley*. It utterly fails to provide lawful support for the excessive award.

In further characterizing the extent of plaintiffs' success, the court stated that the "central and most important issue in this case was whether there was police misconduct committed and condoned by defendants." (App. 2 at 2-6). The district court further held that, because plaintiffs established such misconduct to the satisfaction of the jury and court, they were automatically entitled to full-rate compensation for each and every hour they devoted to the case.

However, these findings go only to whether the plaintiffs were the "*prevailing party*", which is the essential prerequisite to receiving *any* fees at all under § 1988. But that is not in dispute now. It is the *magnitude* of the fees which is now in issue. And the fact that the plaintiffs prevailed on the basic issue of police misconduct *vel non* is simply not responsive on that issue.

Moreover, the court's statements fundamentally mischaracterize the very nature of litigation. The purpose of litigation is not merely to establish that some wrong has been done, but to provide remedy and redress for actionable legal wrongs. The establishment of police misconduct was only the first step in this litigation; establishing entitlement to a substantial remedy is the equally important second step. Therefore, the *magnitude* of the remedy is necessarily a crucial factor in assessing the *degree* of success for purposes of awarding sizeable attorney's fees. In curtly dismissing the significance of the magnitude of the remedy, the court committed further reversible error.

The district court's analysis also shows that it misunderstood the very concept of successful results as it relates to the amount of reasonable attorney's fees.

The court's dramatic characterization of the misconduct on which liability was based collides inconveniently with its simultaneous efforts to bolster the magnitude of counsel's achievement in securing any damages at all. Thus, the court described the police misconduct as "shocking" and "motivated by a general hostility to the Chicano Community." If this be so, then it is fair to ask why an "outstanding" level of representation was necessary to establish minimal liability and recover modest damages. If the police misconduct was truly "shocking", then it should not have taken great courtroom skill to persuade the jury in plaintiffs' favor. Moreover, given the sometimes extreme generosity of juries when presented with "shocking" misconduct by defendants (see police cases cited at p. 22, *supra*), the substantiality of the $33,000 damage award is diminished all the more. In short, the district court simply cannot have it both ways on this point.

An additional fatal flaw in the district court's post-remand analysis concerns the shortcomings of the time records maintained by plaintiffs' counsel. In holding that there would be no reduction in the claimed fee based on unproductive or non-compensable time, the court stated as follows (App. 206, F. of F. 7):

> The time devoted to claims on which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail.

This finding is transparently invalid. For example, the record shows that seventeen defendants prevailed on pre-trial motions for summary judgment. The claims against those seventeen were indisputably groundless; under the standards of Rule 56, F.R. Civ. P., there was

"no genuine issue as to any material fact" respecting their non-liability. Clearly, plaintiffs were entitled to no attorney's fees for the pursuit of those groundless and extraneous claims. And it is difficult to conceive that plaintiffs' counsel could not reasonably segregate the time devoted to the unsuccessful defenses against the summary judgment motions.

If counsels' recordkeeping was so cursory and slovenly as to fall short of even that minimal standard, counsel simply cannot be heard to complain of any fees he forfeits thereby. As stated in *Hensley v. Eckerhart, supra*, 461 U.S. at 437, "[T]he fee applicant bears the burden of . . . documenting the appropriate hours expended." As Chief Justice Burger further developed this point, *id.* at 440-41 (Burger, C.J., concurring):

> I read the Court's opinion as requiring that when a lawyer seeks to have his adversary pay the fees of the prevailing party, *the lawyer must provide detailed records of the time and services for which fees are sought.*
>
> * * * *
>
> [*T*]*he party who seeks payment must keep records in sufficient detail* that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed. [Emphasis added].

The district court's post-remand findings and conclusions not only ignore these admonitions, but flagrantly contradict them. Incredibly, the district court would require the defendant city to bear the enormous cost of plaintiffs' counsels' inadequate time-recording practices. That inequitable approach has been emphatically rejected by other circuits as well as by this Court in *Hensley*. *Wojtkowski v. Cade*, 725 F.2d 127, 130 (1st Cir. 1984); *Grendel's Den, supra*, 749 F.2d at 951-52. Like virtually everything else in its misbegotten opinion, this reasoning actively condones and encourages the very worst tend-

encies of unprincipled or undisciplined counsel. Unless this Court is to propagate the same kind of misguided policy, it should emphatically reject the district court's analysis in its entirety.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed. The case should be remanded to the district court with instructions to reduce the fee award to a reasonable amount not exceeding the amount of damages recovered by the plaintiffs.

Respectfully submitted,

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